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JUL 18 1979
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IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM 1979

NUMBER 79-5080

ARCHIE W.WILLEFORD

Petitioner

V

W.J.ESTELLE,DIRECTOR TEXAS

DEPARTMENT OF CORRECTIONS

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Archie W.Willeford

TDC No.211490

Ellis Unit

Huntsville Texas 77340

Pro per/Pro Se

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM 1979

NUMBER_____

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RECEIVED
JUL 18 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Archie W.Willeford

Petitioner

V

W.J.Estelle Jr.Director Texas Department of Corrections

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Archie W.Willeford, the petitioner herein, prays that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit.entered in the above entitled cause on May 18,1979 and September 20,1976.

OPINIONS BELOW

The opinions/orders of the Texas Court of Appeals;the United States District Court for the Southern District of Texas-Houston Division;and the United States Court of Appeals for the Fifth Circuit is attached hereto as Appendix.

JURISDICTION

The judgement of the United States Court of Appeals for the Fifth Circuit was entered on May 18,1979 and on September 20,1976.The Jurisdiction of this Court is invoked under Title 28 Sections 1651 of the United States Code.

QUESTIONS PRESENTED

I. Whether the Court of Appeals was in error in denying Petitioners Application for Certificate of Probable Cause;

II. Whether Petitioner was denied/deprived of the right tho the effective assistance of counsel at the sentencing stage of the proceedings;

III. Whether Petitioner was denied/deprived of a full,fair and impartial trial/hearing;

IV. Whether the reformation of Petitioners sentence by the Texas Court of Criminal Appeals "Cured" the illegality,unlawfulness, and unconsitutionality of Petitioners trial/hearing at the sentencing stage of the proceedings;

V. Whether Petitioner was/is denied/deproved of his liberty in violation of the Due Process Clause of the United States Constitution;

CONSTITUTIONAL PROVISIONS INVOLVED

I. In all criminal prosecutions,the accused shall enjoy the right to a speedy and public trial,by an impartial jury of the state or district wherein the crime shall have been committed,which district shall have been previously ascertained by law,and be informed of the nature and cause of the accusation;to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.US CONSTITUTION AMENDMENT VI;

II. All persons born or naturalized in the United States,and subject to the jurisdiction thereof,are citizens of the United States and the State wherein they reside.No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life,liberty or property, without the due process of law;nor deny to any person within its jurisdiction the equal protection of the law. US CONSTITUTION AMENDMENT XIV.

STATEMENT OF FACTS

Petitioner,Archie W.Willeford,was tried and convicted on or about April 16,1960 (The State of Texas -v- Archie W.Willeford No.13326,Harris County Houston Texas) for "Possession of A Narcotic Drug,to Wit:Herion (2 gms). in violation of the Texas Uniform Narcotic Act (Art.725 b (23) Texas Penal Code) with two (2) prior convictions alleged:

(A) The State of Texas -v- Archie W.Willeford No.64894,Harris County,Houston Texas (May 1952)(Possession of 4 dialaude Tablets);

(B) The State of Texas -v- Archie W.Willeford No 18427 Navarro County,Corissicanna Texas (November 1964)(Possession of a Hypodermic Needle)

the court in error sentenced the Petitioner under the Habitual Criminal Act (Texas Penal Code Article 63) to a mandatory life sentence,over objetcions by Petitioners Counsel-that Article 725 b(23) carried withit its own sentencing provisions of an indeterminate sentence of 10 years - to - life applied.

The Texas Court of Criminal Appeals affirmed Petitioners conviction but found sua sponte that Petitioner had been erroneously sentenced to a madatory life sentence under Article 63,instead of the more specific sentence under Article 725 b (23)(Willeford -v- State 454 SW2d745 (1970) and the court reformed Petitioners sentence to read no less than 10 years and no more than life.The Court in its opinion held:

" It is noted that the sentence reads that the punsihment is for life Article 725 b(23) provides that upon a second or subsequent conviction one is punishable by imprisonment for no less than 10 years and no more than life.The special provisions of Article 725 controls and the provisions of Article 63 T.P.C.,our Habitual Criminal Statute,are not applicable"

Petitioner then sought relief by way of Federal Habeas Corpus to the United States District Court for the Southern District of Texas -Houston Division under 28 USCA Section 2241.The Honorable James M.Noel Jr.denied the Petition without an evidentiary hearing or appointing legal counsel and the United States Court of Appeals for the Fifth Circuit granted appeal in forma pauperis and appointed counsel.

Petitioner presented basically two (2) main points:

(A) Petitioner had been tried in prison clothing;and

(B) Petitioner had been denied/deprived of the due process and equal protection of the law by the improper and void sentence under the general Habitual Offender Statute and the reformation of the s entece did not cure the defect,but denied him arbitrarily,benefits under state law and treated him differently from other criminal defendants similarly situated.

The Fifth Circuit on September 20,1976 affirmed Petitioners denial (Willeford -v- Estelle 538 F 2d 1194)addressing themselves to the initial issue of the clothing,the court held that due to Petitioners failure to object,it did not constitute a Constitutional denial of a right.As to the issue of the sentencing the court held:

"The length of a sentence of a convicted criminal under state law is, without more,not a matter of Federal Constitutional concern and hence not a matter cognizable under Federal Habeas Corpus"

Petitioner feels that the words "without more" is or was a clear indication to bring back a more specific claim,instead of the blanket claim of denial of due process and equal protection.Petitioner has attemted to bring back a more specific claim to no avail:

A. Petitioner refiled for habeas corpus relief back to the Federal District Court (Willeford -v- Estelle No.H-77-257 (USDC-SD Tex-Houston Div).in which Petitioner specifically enumerated his grounds:

1. Denial of Const itutional right to Counsel;
2. Denial of Constitutional right to the Effective Assistance of Counsel;
3. Denial of the right to the Due Process of Law;and
4. Subjected to an eroneous sentence which constituted cruel and unusual punishment.

On September 23,1977 the District Court Judge at the reccommendation of the US Magistrate,issued his order and final judgement dismissing Petitioners application with prejudice for failure to state a claim. On Novemeber 14,1977 the Fifth Circuit denied Petitioners Pro Se application for "Certificate of Probable Cause" and for "Leave to Appeal in Forma Pauperis".

B. On Feburary 8,1978 Petitioner returned to the State Courts seeking Habeas Corpus relief,and on March 1,1978 the Texas Court of Criminal Appeals,upheld the denial for relief without written order.

On August 1,1978 Petitioner again sought relief by way of Habeas Corpus from the Federal Courts (Willeford -v- Estelle No.78-1462 (USDC-SD Tex-Houston Div.) on December 18,1978 Petitioners Petition for Wr t of Habeas Corpus was agin denied on the reccommendation of the US Magistrate.On December 29,1978 Petitioner filed his"Notice of Appeal" and "Application to Proceed on Appeal in Forma Pauperis",Which onf Feburary 12,1979 was also denied based on the recommendation of the US Magistrate.On March 26,1979 Petitioners "Motion to Reconsider or in the Alternative Motion For Leave to Take and Interloctory Appeal In Forma Pauperis" was also denied baised solely on the recommendation of the US Magistrate.On May 18,1979 the Fifth Circuit denied Petitioners "Application to Proceed in Forma Pauperis" and Application for Certificate of Probable Cause".

Petitioner would at this time like to point out that at all times mentioned herein-except for the trial stage,the original appeal and the hearing in the Fifth Circuit- Petitioner has been without the assistance of counsel and he is now 66 years of age with a 10th grade education and now must depend upon another inmate to assist him.

DISCUSSION

In considering the Constitutionality of the Petitioners sentence the court must first realize that the trial court,over streneous objections by this Petitioners Court Appointed Counsel,senetnced the Petitioner to a Mandatory Life sentence pursuant to Artical 63,which did not apply to this Petitioners case,and should not have been done,and the State of Texas i n the Opinion by the Texas Court of Criminal Appeals admits this.The Texas Court of Criminal Appeals then trying to cure the illegal,unlawful and unconstitutional sentence reformed the sentence to comply with Article 725 b (23).It is the Petitioners Contention that the sentence was not cured,but the problem that existed was only compounded.

Undre Artical 63 there are no degrees of punishment after the finding of guilty only a mandatory life sentence,the court can not consider any mitigating circumstances or evidence.But under the proper sentence under Article 725 b(23) there are degrees of punishment of 10 years to life or any number of years in between,an the court or jury can consider any and all mitigating circumstances and evidence.

The Texas Court of Criminal Appeals in the reformation of the sentence without returning the Petitioner to the trial court and allowing the Trial Court to entertain and consider any and all mitigating circumstance and evidence,subject the Petitioner to the same denial/deprivation of the same rights that he had been denied/deprived of in the original sentencing specifically the right to the effective assistance of counsel at the sentencing stage of the proceedings,and a full,fair and impartial hearing where he could present any and all mitigating circumstances and evidence in his behalf,so it is apparant that the reformation without returning the Petitioner to the trial court did not cure anything.

The Mitigating circumstance of which the Petitioner speaks is,at the time of trial he was 55 years old and had been a narcotic addict for approximatly 30 years.He is not nor has he ever been known or suspected to be a pusher or a dealer in drugs.His prior convictions were for (1952)Possession of 4 dialaude Tablets and in(1964) for possession of a hypodermic needle and the present offense of possession of 2 grams of herion,and the life sentence imposed(due to Texas's inadequate Parole System the 10 years means nothng) must clearly be considered disproportionate.While Petitioners offenses merits punishment,not only individually but also because of thier cummulative impact,they hardly suggest that he represents a threat to society as such a depraved individual to call forth the harshest penalty short of death.

REASONS FOR GRANTING

WRIT

As cause for granting this Writ of Certiorari,your Petitioner would Show:

1. This conviction merits this courts intervention on the gorunds that Petitioner may have recieved a substantially lighter sentence had either he or his court appointed counsel not been prevented by the state -not once but twice- from presenting mitigating circumstances and evidence in his behalf prior to the pronouncement of the sentence.and as this court has held that the denial of the opportunity to be heard in defense or in mitigation is a denial of the due process of law.see Taylor -v- Hayes 94 S.Ct 2697;
2. This conviction merits this courts intervention on the grounds that Petitioner simply was not provided with the full due process rights intrgal with that section of the Narcotic Act that he was tried under and which he should have been sentenced,and it is inconcievable that any court can hold that such a procedure that was

used was either fair or consistant with the due processes of law.

3. But more so, this conviction merits this c urts intervention to provide the due processes of law that the lower courts can not or will not provide and to uphold the Constitution of the United States.

WHEREFORE your Petitioner,Archie W.Wi leford,Respectfully prays that a Writ of Certiorari be issued to review the judgements of the United States Court of Appeals for the Fifth Circuit in the above captationed cause.

Respectfully Submitted
Archie W Willeford
Archie W.Willeford
TDC No.211430
Ellis Unit
Huntsville Texas 77340

Subscribed and sworn to before me this 14th day of July 1979
Delwin C. Broesche
Notary Public in and for the
County of Walker,State of Texas

My Commission Expires :_____

DELWIN C. BROESCHE
NOTARY PUBLIC. WALKER CO. TEXAS
MY COMMISSION EXPIRES: 6 30 80

ARCHIE W. WILLEFORD, Appellant
NO. 42,785, v. - - - Appeal from Harris County
THE STATE OF TEXAS, Appellee

OPINION

The conviction is for the possession of heroin; two prior Texas convictions, for the possession of heroin and for the possession of narcotics paraphernalia, were alleged under Article 725b, V.A.P.C.; after a verdict of guilty by the jury, the court assessed the punishment at life.

Houston narcotics officers went to an apartment building and set up a surveillance and observed the apartment where Tommy Hawkins resided for some six hours. From another apartment they observed Willeford, the appellant, and Hawkins enter and leave the apartment at different times. Each man would leave the apartment and go to a shed-like carport and would remain there behind a trailer for approximately one minute each time and then return to the apartment.

At approximately seven o'clock in the evening, Officer Bell went to the area where appellant and Hawkins had been visiting and found two syringes wrapped in paper and a penny matchbox with two capsules containing heroin on a brace or piece of angle iron underneath the trailer. The officers then marked the articles and returned them to the brace and went to their observation points to continue the surveillance. Shortly thereafter they saw Willeford come out of the apartment, go to the trailer and return before they could approach him. Then Hawkins came out, went behind the trailer and was arrested on his way back. The officers found one of the previously marked packages with the syringes in Hawkins' pocket. As appellant stepped out of the apartment, he was arrested, and the officers found the previously initialed matchbox which contained the two capsules of heroin in his pocket.

Appellant contends in the second ground of error that the heroin was found as the result of an illegal search of a home without a warrant and testimony of the officers and the heroin should not have been admitted into evidence.

The evidence shows that there were some fifteen to twenty separate apartments. The trailer, the ownership or control of which is not shown, was parked in a parking area for the apartments which was separated from the apartments by a brick wall and a "regular little courtyard." There was no showing that the place where the trailer was parked was assigned to the apartment occupied by Hawkins. It was not shown that there was a search of any property that appellant owned, possessed or had a right to use. Appellant has no standing to question the legality of the search. Schepps v. State, 432 S.W.2d 926.

Appellant relies upon Niro v. United States, 388 F.2d 535. It is not in point. There a locked, completely enclosed, garage leased by Niro was searched, and the court held that he had standing to complain.

The second ground of error is overruled.

In the first ground of error, complaint is made that the search of appellant was illegal and the heroin seized was inadmissible, because there was no probable cause for the arrest.

Outside the presence of the jury, Officer Bell testified that he and his partner went to the apartment house as a result of a telephone call from an informant from whom he had previously received reliable information which had led to convictions for narcotic violations. They then set up the surveillance to secure additional information in order to obtain a search warrant. It appears that the narcotics officers with the information from the informant, plus the finding of the syringe and the capsules as set out above had sufficient facts and probable cause to believe that a crime was being committed in their presence at the time the arrest was made.

Article 14.01, Sec. b, V.A.C.C.P., provides:

> "A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view."

See Thompson v. State, 447 S.W.2d 175, and Rangel v. State, 444 S.W.2d 924.

The first ground of error is overruled.

It is noted that the sentence reads that the punishment is for life. Article 725b, V.A.P.C., provides that upon a second or subsequent

conviction one is punishable by imprisonment "[f]or not less than 10 years nor more than life." This specific provision of Article 725b, supra, controls and the provisions of Article 63, V.A.P.C., our habitual criminal statute, are not applicable. Granado v. State, 329 S.W.2d 864. The sentence is reformed to read "for not less than ten years nor more than life."

The judgement, with the sentence reformed, is affirmed.

Douglas, Judge

(Delivered April 29, 1970)

THE OPINION IN WILLEFORD V.
ESTELLE HAS NOT BEEN FILMED.
IT CAN BE FOUND AT 538 F.2d 1194.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
OFFICE OF THE CLERK

V. BAILEY THOMAS
CLERK

P.O. Box 61010
Houston, Texas 77208

January 17, 1979

Clerk,
Fifth Circuit Court of Appeals
600 Camp Street
New Orleans, La. 70130

RE: CIVIL H-78-1462 ARCHIE W. WILLEFORD, #211490
vs
W. J. ESTELLE, JR.

Dear Sir:

Enclosed you will find certified copies of (1) Notice of Appeal filed 12-29-78, and (2) Clerk's Docket entries of the subject case.

Attorney(s) for the Appellant and Appellee are indicated on the first page of Docket entries attached.

Please acknowledge receipt by returning the attached copy of this letter.

Sincerely,
V. BAILEY THOMAS, CLERK

By: Michal Coyan
Deputy Clerk

Enclosures:

cc: Archie W. Willeford
Dunklin Sullivan

8

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
DEC 29 1979
V. BAILEY THOMAS, CLERK
BY DEPUTY M. Coyan

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON, DIVISION

Archie W. Willeford,
Petitioner

vs.

W.J. Estelle, Jr., Director
Texas Department of
Corrections

Pro-Se

CAUSE NO. H-78-1462

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Archie W. Willeford, Petitioner in the above numbered and styled cause, and respectfully gives this Honorable Court his notice of appeal to the United States Court of Appeals for the Fifth (5th) Circuit in New Orleans, Louisiana, on this the 21st day of December, 1978.

Respectfully submitted,

Archie W. Willeford

Archie W. Willeford,
Petitioner
Ellis Unit
Huntsville, Texas 77340

TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, Clerk
By Michal Coyan
Deputy Clerk

T/OFFICE	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YEAR	J	N/S	O	R	R 23	$ DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR.	DOCKET NUMBER
41-4	78	1462	8	1	78	3	530	1				4112			

H-78-1462

ROBERT O'CONOR

DEFENDANTS H. LINGO PLATTER

PLAINTIFFS CLOSED 12-18-78. JS-6, a.s.

ARCHIE W. WILLEFORD #211490

W. J. ESTELLE, JR.

CAUSE

Sentenced under improper statute at punishment phase of trial. HABEAS 28 USC 2254

ATTORNEYS

Archie W. Willeford
Ellis Unit
Huntsville, Texas 77340

Deft. 1
Dunklin Sullivan
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512--475-3281)

TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, Clerk
By Michael Cooper
Deputy Clerk

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS CARD	DATE MAILED
	8-1-78	#517 $5.00		JS6	MDW
				JS6	

H-78-1462 ROBERT O'CONOR H. LINGO PLATTER

DATE	NR.	PROCEEDINGS
-1-78	1	ORIGINAL PETITION, filed. Petitioner notified of filing, file sent to(H.L.P.)
-1-78		SUMMONS issued to deft. (1).
-15-78	2	(HLP) ORDER, filed. p/n r.r. 1. Pltf. to remit w/i 15 days, by separate money orders, $5.00 to U.S. District Clerk for filing fee and $3.00 to U.S. Marshal for service fee. 2. Failure to comply will result in dismissal.
8-29-78		Pltf. ntfd. by U. S. Magistrate that this case will not be dismissed in view of filing fee received 8-1-78. Service fee forthcoming, according to Pltf. letter recd. this date.
9-11-78	3	RETURN of Summons on W.J. Estelle, Jr. thru Dunklin Sullivan served 8-23-78 by delivery to David Kendall, filed.
0- 5-78	4	ANSWER of Deft. w/STATE COURT RECORDS, filed.
0-17-78	5	TRAVERSE of Pltf. to Deft. Answer, filed.
2-18-78	6	(HLP) MEMORANDUM and RECOMMENDATION, filed, recommending dismissal of this case (s/12-12-78). P/n. a.s.
2-18-78	7	(RO) ORDER of DISMISSAL and FINAL JUDGMENT, filed. P/n. a.s. 1. Court adopts Magistrate's Recommendation of 12-12-78 and CASE DISMISSED for Pltf. failure to state a deprivation of constitutional magnitude.
2-29-78	8	NOTICE OF APPEAL of Pltf., filed.
2-29-78	9	MOTION of Pltf. to Proceed on Appeal in Forma Pauperis, filed. (HLP)

H-78-1462	ARCHIE W. WILLEFORD vs W. J. ESTELLE, JR.	RO	12-29-78	2- 7-79		NONE		
VIL ACTION #	STYLE	JUDGE	NOTICE OF APPEAL FLD	RECORD DUE/EXT'D	RECORD RETURNED	COURT REPORTER	JUDGMENT OF CT. OF APPEALS	ORDER TO DISBUR FWD. TO FIN. UN

TO BE COMPLETED BY CLERK'S OFFICE

PORTANT NOTICE TO PARTIES

X APPELLANT WILL FORWARD $5.00 FILING FEE BY RETURN MAIL (28 USC 1917)
___ COST BOND ON APPEAL IN THE SUM OF $250.00 MUST BE FILED (Rule 7 FRAP)
___ (UNDER RULE 10d & 11 FRAP) COUNSEL WILL file A DESIGNATION OF RECORD WITHIN 10 DAYS IF THERE WAS A TRIAL OF HEARING, COUNSEL FOR APPELLANT MUST CONTACT THE COURT REPORTER IMMEDIATELY. (FRAP Rule 10 & Local Rule 15g REQUIRES this to be done within 10 days.

HE COURT REPORTER IS:

7705 U. S. COURTHOUSE
515 RUSK
HOUSTON, TEXAS 77002

HE COURT REPORTER WILL REQUIRE ADVANCE AYMENT FOR THE TRANSCRIPT. THE TRANSCRIPT UST BE FILED IN THE COURT OF APPEALS ON R BEFORE _____, UNLESS TIME IS XTENDED. (Rule 11d FRAP) IF COURT REPORTER EQUIRES ADDITIONAL TIME, HE/SHE & THE TTORNEY WILL APPROACH THE COURT FOR AN RDER.

OPIES OF THIS NOTICE ARE BEING FORWARDED O COUNSEL OF RECORD & COURT REPORTER.

Date: 1-17-79

V. BAILEY THOMAS, CLERK
BY: Muriel Cogan
Deputy Clerk
P.O. BOX 61010
Houston, Texas 77208

FILING FEE RECEIVED: _____
COST BOND ON APPEAL RECEIVED:
____ CASH ___ SURETY ON: _____
FROM: _____

_____ IN FORMA PAUPERIS Motion filed 12-29-78
GRANTED _____
DENIED _____
N/A _____

_____ CERTIFICATE OF PROBABLE CAUSE
GRANTED _____
DENIED _____
N/A _____

APPELLANT: Pltf. Pro Se.
ATTORNEY FOR APPELLANT:
Archie W. Willeford #211490
Rt. 3, Ellis Unit
Huntsville, Texas 77340

ATTORNEY FOR APPELLEE:
Dunklin Sullivan (AAG)
P.O. Box 12548, Capitol Station
Austin, Texas 78711

PARTIES NOTIFIED:
XX NOTICE OF APPEAL FILED 12-29-78
____ RECORD ON APPEAL FORWARDED
____ OTHER: _____

CASE # IN CT. OF APPEALS _____
JUDGMENT___, ORDER___ & MANDATE___
FILED ON: _____
____ AFFIRMED ____ DENIED
REVERSED AND REMANDED

PREPARATION OF RECORD BY CLERK, DISTRICT COU
_____ (A) ALL ORIGINAL PAPERS
_____ (B) SEE DESIGNATION FLD ON: _____
_____ (C) COURT REPORTER: _____
_____ (D) OTHER: _____
_____ (E) ORIGINAL EXHIBITS RETAINED IN HOUSTON FOR USE OF COUNSEL

RECORD ON APPEAL MAILED TO:
CLERK, COURT OF APPEALS
600 CAMP STREET
NEW ORLEANS, LA. 70130

____ WITH
____ WITHOUT ORIGINAL EXHIBITS

____ WITH
____ WITHOUT ORIGINAL DEPOSITIONS

____ WITH
____ WITHOUT ORIGINAL TRANSCRIPTS

____ SUPPLEMENTAL RECORD MAILED ON: _____

NOTES: You need to file a REQUEST for a Certificate of Probable Cause IMMEDIATELY before the Motion to Proceed on Appeal in Forma Pauperis will be ruled on.....

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
FEB 21 1979
V. BAILEY THOMAS, CLERK
BY DEPUTY, M. Cogan

ARCHIE W. WILLEFORD, §
§
Petitioner §
§
V. § CIVIL ACTION NO. H-78-1462
§
W. J. ESTELLE, JR., Director, §
Texas Department of Corrections, §
§
Respondent §

Judge Robert O'Conor, Jr.

O R D E R

For the reasons set forth in the United States Magistrate's Memorandum and Recommendation, signed on February 9, 1979, it is ORDERED that said Memorandum and Recommendation be and the same is hereby adopted as the Court's Memorandum and Order.

It is therefore ORDERED, ADJUDGED and DECREED as follows:

(1) Petitioner is DENIED permission to prosecute his appeal in this case under Section 1915, Title 28, United States Code; and

(2) A certificate of probable cause is DENIED under the provisions of Section 2253, Title 28, United States Code.

The Clerk will enter this Order and provide all parties with a true copy.

Done at Houston, Texas, this 21st day of February, 1979.

Robert O'Conor, Jr.
UNITED STATES DISTRICT JUDGE

TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, Clerk
By Muriel Cogan
Deputy Clerk

14.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
FEB 21 1979
V. BAILEY THOMAS, CLERK
BY DEPUTY M. Cooper

ARCHIE W. WILLEFORD, §
Petitioner §
§
V. § CIVIL ACTION NO. H-78-1462
§
W. J. ESTELLE, JR., Director, §
Texas Department of Corrections, §
§
Respondent § Judge Robert O'Conor, Jr.

MEMORANDUM AND RECOMMENDATION:

Petitioner filed this action pursuant to 28 USC §2254. The action was dismissed and a final judgment was entered on December 18, 1978. Presently before the Court are Petitioner's Motion to Proceed In Forma Pauperis and Request for a Certificate of Probable Cause.

It is RECOMMENDED as follows:

(1) Petitioner be denied permission to prosecute his appeal in this case under Section 1915, Title 28, United States Code, since the Magistrate believes that said appeal is lacking in merit and, as a result, is not taken in good faith.

(2) A certificate of probable cause be denied under the provisions of Section 2253, Title 28, United States Code, since there is not a substantial question of law for the Court of Appeals to review.

Done at Houston, Texas, this 9th day of February, 1979.

UNITED STATES MAGISTRATE

TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, Clerk
By _____ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
MAR 26 1979
V. BAILEY THOMAS, CLERK
BY DEPUTY M. Cooper

ARCHIE W. WILLEFORD, §
Petitioner §
§
V. § CIVIL ACTION NO. H-78-1462
§
W. J. ESTELLE, JR., Director, §
Texas Department of Corrections, §
§
Respondent §

ORDER

For the reasons set forth in the United States Magistrate's Memorandum and Recommendation, signed on March 26, 1979, it is ORDERED that said Memorandum and Recommendation be and the same is hereby adopted as the Court's Memorandum and Order.

It is therefore ORDERED, ADJUDGED and DECREED that Petitioner's Motion to Reconsider Order, Or in the Alternative, Motion for Leave to Take an Interlocutory Appeal In Forma Pauperis is DENIED.

The Clerk will enter this Order and provide all parties with a true copy.

Done at Houston, Texas, this 26th day of March, 1979.

Robert O'Conor
UNITED STATES DISTRICT JUDGE

TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, Clerk
By Michael Cooper
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
MAR 26 1979
V. BAILEY THOMAS, CLERK
BY DEPUTY M. Coyer

ARCHIE W. WILLEFORD, Petitioner	§	
V.	§	CIVIL ACTION NO. H-78-1462
W. J. ESTELLE, JR., Director, Texas Department of Corrections, Respondent	§	Judge Robert O'Conor

MEMORANDUM AND RECOMMENDATION:

This habeas action was dismissed by the Court for failure to state a deprivation of constitutional magnitude. Final judgment was entered on December 18, 1978. Petitioner's subsequent Motion to Proceed In Forma Pauperis and Request for a Certificate of Probable Cause were denied on February 9, 1979. Presently pending in the case is Petitioner's Motion to Reconsider Order, Or in the Alternative, Motion for Leave to Take an Interlocutory Appeal In Forma Pauperis.

The instant motion is a restatement of Petitioner's original claim. Accordingly, it is RECOMMENDED that Petitioner's Motion to Reconsider Order, Or in the Alternative, Motion for Leave to Take an Interlocutory Appeal In Forma Pauperis be DENIED for the reasons stated in the Magistrate's Memorandum and Recommendation of December 12, 1978, and in Willeford v. Estelle, 538 F.2d 1194 (5th Cir. 1976).

Done at Houston, Texas, this 26th day of March, 1979.

UNITED STATES MAGISTRATE

TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, Clerk
By Mildred Coyer
Deputy Clerk

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

500 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

May 18, 1979

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 79-8175 - Archie W. Willeford vs. W. J. Estelle, Jr., etc.

(Dist. Ct. No. 78-1462-H-CA)

The following action has this day been taken in the above case:

( ) Motion to proceed on the original record granted.

( ) Motion to proceed on the original record and typewritten brief granted.

( ) Motion to consolidate granted.

( ) Motion to supplement or correct record granted.

( ) Motion for leave to file supplemental brief granted.

( ) Motion for leave to file brief amicus curiae is granted.

( ) Motion for leave to file brief in preliminary typewritten form is granted.

( ) Joint motion as to time for filing briefs granted.

(XX) Order enclosed has been entered.

( )

cc and enclosure to:

Mr. Archie W. Willeford
Mr. Dunklin Sullivan
Mr. V. Bailey Thomas, Clerk

P.S. to Mr. Thomas: Returned herewith is your record on appeal. Please acknowledge receipt.

EDWARD W. WADSWORTH, Clerk

By Betty H. Martinez
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
May 18 '79
EDWARD W. WADSWORTH
CLERK

No. 79-8175

ARCHIE W. WILLEFORD,

Petitioner,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent.

- - - - -
On Application for Certificate of Probable Cause
and for Leave to Appeal in Forma Pauperis
- - - - -

O R D E R:

IT IS ORDERED that petitioner's pro se application for certificate of probable cause and for leave to appeal in forma pauperis is denied.

Paul H. Roney
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
OCT 19 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

* * *

OCTOBER TERM, 1978

* * *

NO. 79-5080

* * *

ARCHIE W. WILLEFORD,

Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

* * *

MEMORANDUM OPPOSING CERTIORARI

* * *

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

OLIVER C. SUTTON, JR.
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

IN THE SUPREME COURT OF THE UNITED STATES

* * *

OCTOBER TERM, 1978

* * *

NO. 79-5080

* * *

ARCHIE W. WILLEFORD,

Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

* * *

MEMORANDUM OPPOSING CERTIORARI

* * *

TO THE SUPREME COURT OF THE UNITED STATES:

I. Petitioner through the above entitled cause seeks a review of an Order of the United States Court of Appeals for the Fifth Circuit entered on May 18, 1979. Said Order dealt with Petitioner's pro se application for certificate of probable cause and for leave to appeal in forma pauperis. That application was filed following an Order of the United States District Court for the Southern District of Texas denying Petitioner previous Motion to Proceed in Forma Pauperis and Request for a Certificate of Probable Cause. That Order was entered on February 21, 1979 in Civil Action No. H-78-1452, and was filed pursuant to an Order and Judgment entered on December 10, 1979, wherein the District Court dismissed Petitioner's application for habeas corpus. Said dismissal having been predicated upon Petitioner's failure to state a deprivation of constitutional magnitude. In that particular cause the United States Magistrate in his Memorandum and Recommendation, which was subsequently adopted by the Court, stated; "it is apparent that Petitioner is again raising the same issues which were decided against him in Willeford v. Estelle, 538 F.2d 1194 (5th Cir., September 20, 1976)."

II. This petition for writ of certiorari was filed on July 18, 1979, more than ninety (90) days since the entry of the judgment by the United States Court of Appeals of which Petitioner now seeks review[1]. The period for applying for a writ of certiorari has not been extended by a Justice of this Court. (U.S.C. Title 28 §2101(c) and Rule 22 of this Court).

III. Petitioner seeks to circumvent the order of this Court through the successive filing of applications for certificates of probable cause and for leave to file in forma pauperis, when in reality he should have filed his application for writ of certiorari within ninety (90) days of September 20, 1976 in order to obtain his review. This may be verified by a review of the issues presented by Petitioner in his current application.

Therefore, in actuality Petitioner's application for a writ of certiorari is out of time, and should be dismissed.

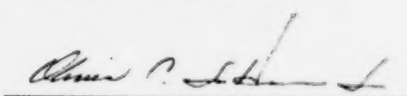
Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division



OLIVER C. SUTTON, JR.
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

1/ That being Willeford v. Estelle, supra.

CERTIFICATE OF SERVICE

I, Oliver C. Sutton, Jr., Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent's Memorandum Opposing Certiorari has been served by placing same in the United States Mail, postage prepaid, certified, return receipt requested on this the 16th day of October, 1979, addressed as follows:

Archie W. Willeford
TDC# 211490
Ellis Unit
Huntsville, Texas 77340

OLIVER C. SUTTON, JR.
Assistant Attorney General

Cir pg 4 Nov 9 Conf

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO.79-5080

RECEIVED
OCT 27 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ARCHIE W. WILLEFORD

Petitioner

V

W.J.ESTELLE JR. Director
Texas Department of
Corrections

Respondent

REPLY BRIEF TO

MEMORANDUM OPPOSING CERTORIARI

To th Honorable Justices of The Supreme Court of The United States:

Petitioner in Reply to Respondents Memeorandum Opposing Certiorari would show that:

1. Petitioners Petition for Writ of Certorari was filed in Forma Pauperis with the Petitioner having to act in pro per/pro se and/or relying on the assistance of a "Jail House Lawyer",and as this Court has held in regards to inmates filing in pro per/pro se that those actions are to be held to less stringent standards than those filed by trained legal counsels.See Haines -v- Kerr 404 US 519.See also Bell -v- Hood 327 US 678 where the Court stated that

> " It is established practice for the court to sustain jurisdiction of Federal Courts to issue injunctions to protect rights safeguarded by the Constitution,and restrain individual state officers from doing what the 14th Amendment forbids the state to do.Moreover,where Federally protected rights are/have been invaded it has been the rule from the beginning that Courts will be alert to adjust remedies so as to grant the necessary relief"

Petitioner can not understand why a person filing for Certorari and/or Habeas Corpus is any different or should be held to more stricter standards than Civil Rights Actions.Petitioner would further point out that the Respondent herein does not deny or attempt to defend against Petitioners allegations or even to dispute the facts that Petitioners rights have been violated;

2. Petitioner is not aware of whether the Respondent is aware that On June 8,1979 Petitioner filed with this Court his Petition for Writ of Habeas Corpus pursuant to 28 USCA Section 2241 (c)(3);Supreme Court Rules 31 (5).Addressed to the Honorable Justice Thurgood Marshall and at the request of Justice Marshall Petitioner filed his Petition for Writ of Certoriari.

3. Petitioner would point out that the questions involved herein this matter presents a valid Constitutional question,and if Petitioners rights have been violated he is entitled to relief.

WHEREFORE PREMISES CONSIDERED Petitioner prays that this court hear this matter and grant Certorari to adjudicate the matter.

Respectfully Submitted

Archie W Willeford

Archie Willeford

TDC No.211490

Ellis Unit

Huntsville Texas 77340

Subscribed and sworn to before me this 22 day of Oct 1979

A. J. Murdock

NOTARY PUBLIC In and For The

County of Walker,State of Texas

A. J. MURDOCK
Notary Public, Walker County, Texas.
My term expires: July 17, 1981.

My Commission Expires on : 7/17/81